Supreme Court of the United States

APRIL TERM, 1949

No. 656

JOHN M. DUNN and DANIEL GENTILE,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners respectfully pray the issuance of a Writ of Certiorari to the Court of Appeals of the State of New York to review the judgment and decision of that Court affirming a judgment of the Court of General Sessions, New York County, convicting them of the crime of murder in the first degree and an order denying a motion for a new trial.

Summary Statement of Matter Involved

Petitioners, together with a co-defendant, Andrew Sheridan, were jointly indicted, tried, and convicted in the Court of General Sessions of the City of New York, County of New York, of the crime of murder in the first degree. The death sentence, in conformity with the mandatory New York statute (Section 1045 of the Penal Law) was imposed

on January 19, 1948 (R 1230, 1233).[1] Upon appeal to the Court of Appeals of the State of New York the judgment of conviction was unanimously affirmed without opinion on July 16, 1948 (298 N. Y. 564).

On August 5, 1948 the co-defendant Andrew Sheridan made a formal, sworn, stenographic confession of the crime to his attorneys and authorized them to submit copies of said confession to the attorneys for petitioners and to the District Attorney of New York County (M 11-42).[2] In his confession Sheridan acknowledged that he had engineered the plot to murder the deceased. He completely exonerated the petitioners, inculpating two others. Petitioners promptly moved for a new trial on newly discovered evidence, pursuant to Section 465, Sub-division 7, of the Criminal Procedure, on the basis of the information thus brought to light (M 4, 5). A hearing was had on said motion in the Court of General Sessions at which Sheridan was called as a witness, testified in the greatest circumstantial detail as to the commission of the crime, repeating his exoneration of petitioners (M 48-231). The hearing was had before the same judge who presided at the trial. The motion was denied, substantially on the ground that the judge did not believe Sheridan's testimony (M 259-269).

An appeal was taken from the order denying the motion for a new trial (M 270-271). A motion for reargument of the appeal was made in the Court of Appeals. The motion for reargument was based, in part, upon the newly discovered evidence, which course is permissible under New York law (*People* v. *Regan,* 292 N. Y. 109). The motion for reargument was granted and the case set down for reargu-

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[1] Numbers in parentheses following "R" refer to page numbers in the record on appeal from the judgment of conviction.

[2] Numbers in parentheses following "M" refer to page numbers in the papers on the Motion for Reargument of the Appeal.

ment for November 1948 (298 N. Y. 706). The granting of the motion for reargument stayed the execution of the death sentence pursuant to Section 528-A of the Code of Criminal Procedure.

On February 24, 1949 the Court reaffirmed the judgment of conviction, two judges dissenting (Desmond and Dye, *JJ.*). No opinion was written by the majority. The dissent was accompanied by the following memorandum:

> "The newly discovered evidence could well change the result if presented to a jury, and accordingly, should be so presented."

The Court of Appeals fixed the date for the death sentence to be imposed for the week beginning April 11, 1949.

Basis of Jurisdiction

The judgment of the Court below was rendered on February 24, 1949. The jurisdiction of this Court is invoked under Section 1257(3), 2101-C of the revised Judicial Code and Rule 38½ of this Court.

The remittitur of the Court of Appeals states:

> "Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: The defendants argued that the denial of the motion for a new trial deprived them of due process of law under the Fourteenth Amendment of the Constitution of the United States. This Court held that the denial of the motion did not violate any rights guaranteed to the defendants by said provision of the United States Constitution."

Question Presented

Where a person condemned to death produces newly discovered evidence which, if believed, positively establishes his innocence, and where such evidence is tested by cross-examination and is not demonstrated to be either false or improbable, may he be denied a new trial on the ground that the trial judge does not believe the evidence offered?

Reasons for Allowance of the Writ

Allegation supported by proof has been made by petitioners, who stand condemned to death, that evidence, conclusive of their innocence, if believed, has been discovered since their trial. The failure to discover it sooner concededly was not owing to any want of diligence on their part. The question presented is of frequent recurrence throughout the courts of the various states and is of general interest in the administration of criminal justice. Whether state courts are free from the restraints of the due process clause of the Fourteenth Amendment in passing upon applications for motions for a new trial on newly discovered evidence is a question of fundamental constitutional importance.

Prayer

For the foregoing reasons, which are developed in more detail in the accompanying brief, your petitioners pray that a Writ of Certiorari issue out of this Court, directed to the Court of Appeals of the State of New York, commanding that Court to certify to this Court for review and determination as provided by law this cause and a complete transcript of the record and all proceedings had herein to the end that the judgment of said Court may be reviewed

and determined by this Court; that the judgment and decision of the Court of Appeals be reversed, and that this petition be heard upon one copy of the record on appeal in the Court of Appeals of the State of New York, and that your petitioners be granted such other and further relief as may be proper.

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BRIEF IN SUPPORT OF PETITION

POINT I

Petitioners were deprived of due process of law as a result of the State Courts' decisions denying them the right to a new trial.

The value of the newly discovered evidence can best be appraised in the setting of the evidence adduced against petitioners on the trial which resulted in their conviction.

Summary of Evidence against Dunn

The principal evidence against Dunn on the trial falls into two categories, (1) ante-mortem statements of the deceased admitted as dying declarations and spontaneous exclamations, and (2) alleged admissions made in the jail by petitioner Dunn to a fellow prisoner, one Tony Tischon.

There were no eye witnesses to the crime (R. 442); petitioner Dunn was not shown to have any motive to prompt

him to commit the crime. Exhaustive and painstaking investigation failed to yield any physical clues linking petitioner Dunn with the commission of the crime (R 442, 443).

In all, ten ante-mortem statements were admitted in evidence. In three of these statements, on the very day of the shooting, January 8, 1947, the deceased solemnly and emphatically denied knowledge of his assailants (R 852, 866, 446-451). These three exculpatory statements were made to the authorities charged with the investigation of the crime. These statements were variously made within a matter of minutes and hours of the fatal assault. One of the statements was made in the Emergency Room of the hospital prior to the performance of an operation upon the deceased. In this statement the deceased solemnly denied that petitioner Dunn was one of the assailants, although the deceased was repeatedly prodded to state that petitioner Dunn was the one who had shot him (R 449).

Although it was alleged that on the day of the fatal assault the deceased had made other statements implicating petitioner Dunn, the latter was not placed under arrest but was held merely as a material witness. In fact, two days after the shooting the District Attorney's office consented to the reduction of his bail as a material witness (590-591).

On January 11, 1947 the deceased made an alleged dying declaration in the hospital implicating the petitioners and the co-defendant, Sheridan[3] (R 389-392).

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[3] In this statement the deceased declared that he had a "60-40" chance of recovery (R 390). We are aware that this Court's jurisdiction does not extend to the review of rulings on the admissibility of evidence in State trials, but we think it significant to call attention to the fact that the dying declaration referred to was admitted notwithstanding that its exclusion was dictated by every authority on the subject that we have been able to find, both in and out of the State of New York. (See *People* v. *Bartelini*, 285 N. Y. 433, 435; *People* v. *Sarzano*, 212 N. Y. 231, 236; *Commonwealth* v. *Roberts*, 108 Mass. 296; *Commonwealth* v. *Haney*, 127 Mass. 455; *Shepard* v. *U. S.*, 290 U. S. 96, 100.)

On January 13, 1947 a further alleged dying declaration was made by the deceased, substantially reiterating the statement of January 11th[4] (R 410-414).

Another alleged dying declaration was made by the deceased on January 28, 1947, on the eve of his death. In this statement the deceased expressed the hope that the defendants would be happy that he was dying[5] (R 219).

The only other evidence against petitioner Dunn in addition to the statements of the deceased which requires mention is that of the witness Tony Tischon. Tischon testified that Dunn made certain cryptic admissions to him in prison while they were both awaiting trial (R 620-639). The first such admission was made on the same date when Tischon was discharged from the psychiatric ward of Bellevue Hospital as a "psychopathic malingerer" (R 617, 932). Tischon's whole life, traced from the age 12 until the moment of his appearance as a witness in the trial against

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[4] This statement was of dubious admissibility. As shown by the hospital records, the deceased was apparently on his way to recovery at the time (R 406-407). It is apparent from the alleged dying declaration itself, as appears from the following excerpt therefrom, that his expression of the abandonment of hope of recovery was merely a *pro forma* assent to the will of his interrogator (R 410):

"Q. How do you feel, Anthony? A. Lousy.

Q. Do you feel that you are going to die? A. Jesus Christ I ain't feeling so good.

Q. Have you given up all hope of recovery? A. I don't know, I don't think I have a chance.

Q. Have you had the priest? A. Yes, a couple of priests.

Q. Did you have the last rites of the church? A. Yes, several times.

Q. Are you a Catholic, Anthony? A. Yes.

Q. Do you tell me now that you have given up all hope of recovery? Is that right? A. Well, yes, all hope of recovery. I don't feel good at all, I feel lousy."

[5] This statement was admitted over the objection of the defendants that the statement was a mere matter of opinion and conjecture, rather than fact (*People* v. *Smith*, 172 N. Y. 210).

petitioners, was one of crime and deceit (R 640-674). At the time of the trial he was under indictment for robbery in the first degree, which charge had not been prosecuted although the case was open and shut and had been pending for almost a year (R 642).

A conviction for robbery in the first degree against Tischon as a second offender would carry with it under New York Law (Sections 1941 and 2125 of the Penal Law) a maximum penalty of 60 years.

Petitioner Dunn's plea of not guilty was supported by evidence of an alibi. Members of his family testified that he was at home at the time when the crime was allegedly committed (R 870-932).

Summary of the Evidence against Petitioner Gentile

The case against petitioner Gentile is based upon dying declarations made by the deceased Hintz and inconclusive proof of flight. The dying declarations were contradictory and fell far short of satisfying the stringent rule laid down by the courts governing the admissibility of such declarations. Assuming their admissibility, the case against petitioner Gentile established nothing more than that he was present at the time of the shooting of Hintz. This is made clear by the district attorney's opening statement to the jury as well as in the district attorney's closing argument to the jury. In this closing argument all the district attorney could say as to the testimony bearing upon Gentile's alleged complicity in the crime was as follows:

> " * * * And I say that the overwhelming proof in this case can lead you to but one verdict, and I ask you in the interests of justice to bring in a verdict of murder in the first degree against all of these defendants, be-

cause although Sheridan and Brooks did not fire any shots, they were there with their presence ready and willing to help; they were aiding, abetting Dunn by their presence" (R. 1147).

There was no proof on the trial of any prior conspiracy between the petitioner Gentile and the person or persons who killed Hintz. There was a dearth of proof that Gentile had any motive to kill the deceased. There was no proof that Gentile knew that the killer was armed or intended to kill the deceased. There was no proof that Gentile said or did anything at the time of the commission of the crime or otherwise aided or abetted in its commission.

By an unbroken line of authorities the principle has been firmly established that proof of presence is insufficient, as a matter of law, to warrant the conclusion that an accused aided and abetted in the commission of the crime. (*Hicks* v. *United States,* 150 U. S. 442, 447; *People* v. *Weiss,* 290 N. Y. 160, 170; *People* v. *Ligouri and Panaro,* 284 N. Y. 309; *People* v. *Cohen,* 223 N. Y. 406; *People* v. *Swersky,* 216 N. Y. 471; Wharton on Homicide (3rd.) p. 60; 26 American Juris §60.)

The whole case against Gentile was based upon circumstantial evidence.* The trial court, however, failed to instruct the jury as to the degree of persuasiveness necessary to establish guilt where the proof is wholly circumstantial.

On the trial the district attorney offered no proof, direct or circumstantial, that Gentile had any motive to kill the deceased.

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* "The *causes celebres* of every country are full of cases, in which individuals, by merely accidental combinations, have been exposed to the most grievous suspicions, and sometimes have been condemned; while other accidents afterwards discovered the injustice or the error which had been committed" (Bentham's Judicial Evidence, p. 147). See also Burrill, A Treatise on Circumstantial Evidence, p. 207.

In *People* v. *Ludkowitz*, 266 N. Y. 233, the Court said at page 241:

> "No motive was shown for the act and no evidence corroborating the dying declaration was offered. Under such circumstances to permit the conviction to stand would shock one's sense of justice."

The Closeness of the Issue as Reflected by the Jury's Deliberations

The case was submitted to a jury at 1:45 P. M. on December 30 (R 1210). The jury reported to the Court at 2 o'clock of the following morning that they had been unable to arrive at a decision and that "in our opinion we are hopelessly deadlocked after almost twelve hours of constant and conscientious deliberation" (R 1214). The trial court treated this as a private communication which did not concern the defendants or counsel, for it did not advise counsel of the communication until after 5 o'clock in the morning, more than three hours after its receipt. Upon receipt of the communication the trial judge instructed the captain to "just let them continue their deliberations" (R 1215).

The jury returned to the court room at 5:25 in the morning and asked that the testimony of five witnesses be read to them (R 1216). The stenographer proceeded to read the desired testimony, and after an hour and twenty minutes the Court declared a recess. The Court had then been in continuous session for almost twenty-one hours and the jury had been deliberating for seventeen of these hours. Counsel for one of the defendants asked the Court to inquire of the jurors whether they were mentally able to continue deliberating, in view of their apparent fatigue. The Court refused to do so (R 1217). The stenographer continued to

read the testimony, which was finally completed at about 7:30 in the morning. One hour later the jury returned a verdict of guilty against all three defendants (R 1218).

Evidence on the Motion for the New Trial

On August 5, 1948 the co-defendant Sheridan made a lengthy, detailed statement to his attorneys in the Death House at Sing Sing Prison (M 11-42). Sheridan acknowledged that he had set into motion and directed the plan for the murder of the deceased. He named his confederates, one of whom was dead. He absolved petitioners from all connection with the homicide.

A motion for a new trial on the basis of newly discovered evidence was made in the Court in which the trial was had, based upon Sheridan's disclosures. By order of the Court, Sheridan was produced in open court and called as a witness on said motion. He repeated the disclosures made in his affidavit and asserted the obvious truth, that he was testifying without any hope or promise of reward. Sheridan was subjected to a most grueling and vigorous cross-examination by the prosecuting attorney, which left his testimony completely unshaken (M 48-231).

The Trial Court's Opinion Denying the Motion for a New Trial

The opinion of Donnellan, *J.*, denying the motion for a new trial is contained at M 260-269. The denial of the motion was based largely upon the view that Sheridan's criminal background made him unworthy of belief. The despicable character of witnesses on behalf of the prosecution, however, has never been deemed an obstacle to the forfeiture of human life under New York Law (*People* v. *Strauss*, 285 N. Y. 376; *People* v. *Buchalter*, 289 N. Y. 181).

The Court in its opinion placed reliance upon evidence which had been properly excluded on the trial but which was admitted on the motion for the new trial despite its patent inadmissibility. The Court further relied upon evidence offered by the prosecution which, although available at the time of the trial, was not then offered.

The Court found in earlier denials of guilt by Sheridan—made by him before the trial—an attitude inconsistent with his present confession. This obviously furnished no logical basis for discrediting his confession.

Affirmance by the Court of Appeals Subsequent to the Denial of Motion for a New Trial

After the granting of a motion for reargument the Court of Appeals affirmed petitioners' convictions by a vote of four to two. Judges Desmond and Dye dissented on the following ground:

> "The newly discovered evidence could well change the result if presented to a jury and, accordingly, should be so presented."

The Denial of the Motion for a New Trial Under All the Foregoing Circumstances Constitutes a Denial of Due Process of Law

The affidavit and testimony of Sheridan presented facts which if believed established petitioners' complete innocence. No testimony could possibly be more material than Sheridan's. Sheridan acknowledged that he engineered the plan which culminated in the deceased's execution. He had no remorse, no regrets. His own guilt is established beyond peradventure of doubt; the People assert it and he acknowl-

edges it. No one knows better than does Sheridan the identity of his confederates. Sheridan has come forth and named them, exonerating petitioners. The motion for a new trial has been denied on the ground that the trial judge did not believe his testimony. In so doing, we earnestly submit the trial court not only erred, but denied rights solemnly guaranteed petitioners under the Fourteenth Amendment of the United States Constitution.

Had Sheridan been offered as a witness on behalf of petitioners, and had the trial court excluded his testimony on the ground that it did not consider Sheridan a credible witness, we think it clear that such a course would have resulted in a denial of due process of law. The step from the hypothetical case to this case is not a long one.

Are petitioners to be penalized simply because Sheridan was unwilling to make his confession sooner? The failure of petitioners to produce Sheridan as a witness in their behalf on the trial was certainly not owing to any want of diligence on their part. There is no basis in the record for any inference that the information was available to them at the time of the trial. Furthermore, even had such information been available Sheridan was not a compellable witness on their behalf (New York State Constitution, Article 1, Section 6).

The decisions of this Court hold that the due process clause of the United States Constitution requires the States to afford an adequate forum for the determination of a claim that a judgment in a criminal case has been obtained by perjured testimony with the connivance of public officials (*People ex rel. Mooney* v. *Holohan*, 294 U. S. 103). We do not, of course, claim, and never claimed, that the District Attorney, or any of his subordinates, was guilty of any misconduct in this case. We urge that the decision in the *Mooney* case does not delimit what must be shown in order

to secure one from an unjust conviction. The evidence on the motion for a new trial, if believed, demonstrates that the trial which resulted in petitioners' conviction was a gross miscarriage of justice. It was but a play in which the principal actor, Sheridan, sat quietly by, observing the false parade of evidence against petitioners.

The requirements of the due process clause are not satisfied by merely affording a forum in which complaint can be made of a denial of constitutional rights. If in such forum relief should be, but is not, granted from a conviction which resulted in a denial of due process of law, this Court has power to intervene (see *Hysler* v. *Florida,* 315 U. S. 411).

The condemnation of an innocent man is abhorrent to the basic concepts of a civilized society. The spectacle of condemned men offering to establish their innocence by positive evidence and being denied that opportunity is a most unedifying spectacle. The evidence now available to them is sufficiently weighty to have prompted two judges of the Court of Appeals to vote to set aside the judgment of conviction so that petitioners could have the opportunity of presenting such evidence to another jury. Reasons of expediency should not control. The conjectures and speculation of the trial judge should not be permitted to override defendants' absolute right to a real day in court.

Due process of law in New York requires the determination in a criminal case of every substantial issue of fact by a jury. Plainly that right is not respected when only part of the material proof is permitted to be given to the jury. Here the trial judge took it upon himself to decide a quite material issue against the defendants, in the face of the indisputable fact that a jury might well have differed with him and believed Sheridan's confession. The trial judge may have been altogether wrong in disbelieving it.

So indeed two judges of the Court of Appeals have held. The substance of the defendants' right to trial by jury has thus been denied them, merely because they were so unfortunate as not to be able to produce the new evidence any sooner. That makes the right to a full and fair jury trial depend, in the end, on chance. Such a ruling is repugnant to every consideration of fundamental fairness; it denies due process of law.

It is earnestly submitted that the question involved herein is of paramount importance in this Court's constitutional supervisory power over criminal proceedings in State courts to the end that constitutional safeguards may be duly observed.

CONCLUSION

A substantial constitutional question of widespread importance in the administration of criminal law is presented by the denial of the motion for a new trial. A Writ of Certiorari should therefore be granted.

Respectfully submitted,

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DANNY BROOKS

Petitioners

against

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Respondent

RESPONDENT'S MEMORANDUM

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* "A," or "appendix," refers to pages in the appendix which follows this brief.

CASES

STATUTES

III

APPENDIX

Supreme Court of the United States

October Term, 1948

No. 656

JOHN M. DUNN and

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DANNY BROOKS

Petitioners

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Respondent

RESPONDENT'S MEMORANDUM

Statement

On December 31, 1947, petitioners Dunn and Gentile, and defendant Andrew Sheridan, were convicted in the Court of General Sessions, New York County, of MURDER IN THE FIRST DEGREE (trial 24-5,* 1218-20; New York Penal Law §1044, appendix 1). On January 19, 1948, they were

* "Trial" refers to pages in the record of trial. "Hearing" indicates pages in the record of the hearing which was held on the motion for a new trial.

sentenced to death (trial 25-7, 1230, 1231-2, 1233-4). On July 16 the judgments were unanimously affirmed, without opinion, by the New York Court of Appeals [298 N. Y. 564, 81 N. E. (2d) 102]. On October 18 the trial court, with opinion, denied a motion by defendants Dunn and Gentile for a new trial (hearing 259, see *id.* 4-10, 260-9; N. Y. L. J., October 19, 1948, p. 833, col. 3). On February 24, 1949, the denial having been reviewed on reargument by the Court of Appeals, that court again affirmed the judgments without opinion (N. Y. L. J., February 28, 1949, p. 730, col. 1; DESMOND and DYE, JJ., dissenting). Defendants Dunn and Gentile now seek certiorari [petition pp. 1, 3, 4-5, brief p. 18; Revised Judicial Code, 28 U. S. C. (1948) §1257 (3), appendix 2].

Introduction

Defendants were convicted for the murder of Anthony Hintz, a New York City longshoreman. Defendant Sheridan later sought to exculpate his co-defendants, who moved for a new trial on the basis of the exculpation. The trial court held a hearing on this motion, at which defendants Dunn and Gentile offered the testimony of Sheridan, and that of other witnesses. Their only claim here, one specifically considered by the Court of Appeals, is that the State courts committed constitutional error in refusing the new trial (petition pp. 1-5, brief pp. 7-18).

TRIAL

Prosecution

At about 7:40 a.m. on January 8, 1947, on the second floor landing of an apartment house at 61 Grove Street in New York City, defendants John M. "Cock-eyed" Dunn, Andrew "Squint" Sheridan, and Daniel Gentile, alias "Danny Brooks," lay in wait for Anthony M. Hintz, a hiring stevedore of the Manhattan waterfront (trial 411-2, also *id.* 219, 281-2, 389, 391, 451, exhibits 3, 17A, J; *cf.* hearing 27, 30, 41-2, 78-9, 171, 175, 178-81, 199, 212, exhibits 5, 8; appendix 3-5, 9-10, 12). About two weeks prior to this rendezvous, defendant Dunn had appeared down in Florida where defendant Sheridan was staying with his family, tried to see him and, failing to find him home, left word where Sheridan should come to see him (trial 766-71, also *id.* 776-7, 944; *cf.* hearing 24, 119, 141, 143, 209; appendix 10-11). About a week before it, after having made necessary family arrangements, defendant Sheridan took the train North (trial 772-3, also *id.* 782-3, 944; *cf.* hearing 25, 136-7, 144, exhibit 3; appendix 9-11, 12).

On the morning in question, as defendants waited for Hintz, a car containing his younger brother drew up in front of the building, to take Hintz to work (trial 282-3, also *id.* 162-3, 172-3, 174, 186, 305-7, 309, 310, 389, 411, 505-

7, exhibits 11, 16; *cf.* hearing 65, 67, 164, 184-5; appendix 4). The driver got out, went up to the front door, and rang Hintz' buzzer to let him know that he was waiting (trial 506-7, also *id.* 186, 283, exhibits 11, 16; *cf.* hearing 67, 184-5). As Hintz left his third floor apartment and came down the stairs, he came face to face with the three defendants (trial 389-92, 411-4, also *id.* 186-7, 238-40, 451, exhibits 3-6, 17, 17A, J; *cf.* hearing 30, 70, 198-9, exhibits 5, 8; appendix 3-7, 12). Defendant Dunn, referring to Hintz by an obscene epithet, stated that they should kill him (trial 413, also *id.* 638-9, *cf.* hearing exhibit 5; appendix 6).

Hintz was on the lower steps leading down to the landing, with the sun shining through a frosted glass window at his back, and with a hall light over the heads of the three defendants (trial 339-42, 412, 564, also *id.* 170-1, 391, 392, exhibits 3, 4, 6; *cf.* hearing 30, 198-9, 201, 212; appendix 4-5). While defendants Sheridan and Gentile stood by, defendant Dunn fired two shots into Hintz at a range of several feet, and Hintz fell (trial 411-3, also *id.* 89-96, 155-7, 166-7, 187-8, 196-7, 240, 390-1, 442, 451, 630-4, 789-90, 813-7, 820-1, 823-4, 964, exhibits 1-3, 18-24, 32-33; *cf.* hearing 30, 70, 73, 77, 212-4, exhibit 5; appendix 3-7, 9-11, 12).

Defendant Sheridan immediately started to run up the stairs which led to the roof of the building, and defendant Dunn began to follow, but Hintz grabbed Dunn by the leg (trial 412-3, also *id.* 390-1, 451, exhibits 3, 4, 6, 7, 9, 10, 12, 15, 17A; *cf.* hearing 30, 70, 199, 200-1, 212-3, exhibit 5; appendix 5, 10-11, 12). Defendant Dunn freed himself after firing three or four more shots into Hintz' body, and hitting him in the mouth (trial 412-3, also *id.* 89-96, 155-7, 166-7, 187-8, 196-7, 240, 451, 630-4, 789-90, 812-7, 820-1, 823-4, 964, exhibits 1-3, 18-24, 32-33; *cf.* hearing 30-1, 70-1, 73, 77, 212-4, exhibit 5; appendix 5, 10-11, 12).

Defendants Dunn and Sheridan fled over the roofs and down through an adjoining building to the next street, where a car was parked with a number of men in it (trial 344-6, 351-6, also *id.* 346-8, 358-60, 362-3, 390, 785-7, exhibits 6-10, 12-16, 17A; *cf.* hearing 24, 26-7, 31-2, 34-6, 38-40, 42, 69-70, 74-6, 77-9, 80, 83, 167-8, 214-6, exhibit 5; appendix 5-6, 12). Defendant Gentile fled down the stairs to the front, where he was seen coming out by Hintz' brother (trial 283-4, also *id.* 175, 297-8, 301, 304-7, 308-11, 312, 315-7, 319-20, 329, 333-8, 379, 390, 412-4, 490-1, 517-8, 520, 522-3, 525-6, 867-8, exhibits 11, 16, J; *cf.* hearing exhibit 8; appendix 5-7, 8-9, 12).

Immediately after the shooting, Hintz cried out the name of defendant Dunn, and Hintz' wife came out into the hallway (trial 187-9, 244-5, also *id.* 238-43, 390-2, 411-3, 960, exhibits 5, 6, 17, 17A; *cf.* hearing 255-8; appendix 3-6, 8-9, 12). She saw him, went back to call the police, and returned to the hall, where her husband was bleeding on the landing (trial 191-2, also *id.* 90-5, 189-91, 245-8, 250, 789-95, 808-9, 840, 960, 962-9, exhibits 3, 4, 5, 6, 17, 17A; appendix 5).

After neighbors came out and helped him upstairs, she guided him into the bathroom, and washed the blood off his face (trial 192, 196-7, also *id.* 247-53, 840-3, 847-51, exhibits 3-6, 17, 17A). As she knelt before him, Hintz told her that he was dying, and that he had been shot by defendant Dunn (trial 192-3, 197, also *id.* 218-9, 390-2, 411-3 446-51, 960, exhibit 17; *cf.* hearing 255-8, exhibits 5, 12; appendix 3-6, 8, 12).

When police came, however, Hintz repudiated this early identification, and both at the apartment and later that day in a stenographic statement to them at the hospital, denied that he knew who had shot him (trial 446-51, 852, 854, 866, exhibit G for identification, also trial 440, 455, 508-11, 867).

After having been spoken to by a police lieutenant who was an old friend from the docks, Hintz subsequently gave police two dying declarations, completely describing the shooting, and implicating all three defendants (trial 389-92, 410-4, also *id.* 218-9, 220-1, 422-3, 424-5, 460-1, 513-5, 516-7, 518-22, 524-5, 526, 529-30, 532-3, 534, exhibits 28-30 for identification; *cf.* hearing 255-8; appendix 3-7, 8-9, 12).

Defendant Dunn was caught by police at about 10 on the morning of the shooting, in his nearby union office (trial 365-7, also *id.* 190-2, 200-2, 371-6, 419-21, 442-5, 516-7, 545-6, 547-50, 566, 579-81, 586-91, 597-9; *cf.* hearing 32-3, 80, 189, 201-3, 226-31, exhibit 5; appendix 4, 8-11, 12). When told that he was going to be confronted with Hintz, defendant Dunn protested (trial 367, also *id.* 392-3, 424-5, 462, 622, Dunn opening 78, exhibit 29 for identification; *cf.* hearing 255-8, exhibit 5; appendix 8-9, 12).

Defendant Sheridan fled back down to Florida, was arrested there on the 24th, and returned to New York for trial (trial 429-31, 785-8, also *id.* 352-6, 363, 425, 427-8, 468-87, 623, 773-4, 783-4, 945, exhibits W, X; *cf.* hearing 33-6, 80-3, 133-5, 187, 194, 196-7, 210, exhibit 11; appendix 5-6, 8-11, 12).

Defendant Gentile surrendered about two months later and, when asked about the shooting, inferentially admitted presence at the scene (trial 546-7, also *id.* 295-6, 299-304, 334-7, 427-8, 429, 491-3, 502, 520, 522-3, 525-6, 540-1, 543, 551-2, 553-61, 623, 628, exhibits 11, 16, J; *cf.* hearing exhibit 8; appendix 5-7, 8-9, 12).

While confined in jail, defendant Dunn spoke to an informer, and indicated guilt (trial 630-4, also *id.* 367, 389-92, 411-3, 622-3, 627-8, exhibits O, R; *cf.* hearing 255-8, exhibit 5; appendix 3-7, 8-11, 12).

Defense

None of defendants testified at trial. Defendant Dunn offered an alibi by his family, and defendant Sheridan introduced evidence to show that his departure for Florida, after the shooting, had been without attempt at concealment (trial 933-45, see *id.* 873-932, exhibits S, W, X).

Hearing

After their convictions had been affirmed, and their requests for stay of execution denied, defendant Sheridan made a death-house exculpation of his two co-defendants (hearing 11-43, see *id.* 260). Defendant Sheridan claimed that he had engineered the entire shooting through two other men, neither now available, and denied that either he or his co-defendants had been present at the shooting (hearing 11-42, see *id.* 12, 19, 48-50, 110, 222, 249-51, exhibits 1, 4, 6, 7; appendix 12).

Defendant Sheridan subsequently testified at the hearing held by the trial judge on the motion of his co-defendants for a new trial (hearing 48-232). Defendant Sheridan denied in particular that he had ever seen defendant Dunn while they both had been down in Florida, or that he had ever discussed the shooting with defendant Dunn (*ibid.*, see hearing 50, 83-4, 109, 129, 132, 218-9; appendix 12).

The prosecution introduced the rail ticket envelope of defendant Sheridan's pre-shooting trip North, on the back of which had been written the New York phone number of defendant Dunn (hearing 245-8, exhibit 3, also hearing 136-7, 140).

Defendant Sheridan, apparently having forgotten the existence of the envelope, was speechless (hearing 137-8, also *id.* 139-44, 207-9, exhibit 3).

The trial judge concluded that Sheridan's exculpation was false, and denied the new trial (hearing 259, see *id.* 268-9).

POINT I

Certiorari should be denied.

Defendants claim that the court erred in denying the new trial (petition pp. 1-5, brief pp. 7-18). This is without merit. Their guilt was fully established, and the denial presents no constitutional issue [see Hearing *supra* pp. 9-10; *cf.* trial 188, 197, 218-9, 283-4, 390-2, 411-4, 622, 627-8, 630-4, 960, appendix 3-11, Trial *supra* pp. 3-8; also *United States* v. *Johnson,* 327 U. S. 106, 111-113; *Hicks* v. *State* (1937) 213 Ind. 277, 302-304, 11 N. E. (2d) 171, 182, cert. den. 304 U. S. 564; *People* v. *Shilitano* (1916) 218 N. Y. 161, 180-181, 182, 112 N. E. 733, 739-740; Law and Cases, appendix 13].

Certiorari should be denied.

Respectfully submitted,

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March 1949

APPENDIX

Statute authorizing conviction

NEW YORK PENAL LAW

§*1044. Murder in first degree defined.*

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

1. From a deliberate and premeditated design to effect the death of the person killed, or of another; * * * * * *.

§*1045. Punishment for murder in first degree.*

Murder in the first degree is punishable by death * * *.

Statute invoked for certiorari

UNITED STATES CODE

JUDICIARY AND JUDICIAL PROCEDURE

§*1257. State courts* • • • *certiorari*

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • •

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. [*28 U. S. C.* (*1948*) §*1257* (*3*)]

A3

Trial

Herman Schmarion, a stenographer in the New York County District Attorney's Office, testified that on January 13, 1947, Anthony Hintz made the following statement (trial 410-4, exhibit 30 for identification):

"Q. [William J. Keating, Assistant District Attorney, New York County] What is your name? A. Anthony Hintz.

"Q. How old are you, Anthony? A. Forty-three.

"Q. Where do you live? A. 61 Grove Street.

"Q. How do you feel, Anthony? A. Lousy.

"Q. Do you feel that you are going to die? A. Jesus Christ I ain't feeling so good.

"Q. Have you given up all hope of recovery? A. I don't know, I don't think I have a chance.

"Q. Have you had the priest? A. Yes, a couple of priests.

"Q. Did you have the last rites of the church? A. Yes, several times.

"Q. Are you a Catholic, Anthony? A. Yes.

"Q. Do you tell me now that you have given up all hope of recovery, is that right? A. Well, yes, all hope of recovery. I don't feel good at all, I feel lousy.

"Q. Andy, who shot you on Wednesday morning, January 8th, at 61 Grove Street? A. Johnny Dunn.

"Q. Who was with him? A. Danny Brooks [Gentile].

"Q. Who else? A. Andy Sheridan, the three of them were there.

"Q. Who fired the shot? A. Dunn, he done well, too.

"Q. How many shots did he fire at you? A. Six.

"Q. What time was this? A. About 18 minutes to eight in the morning. I was going to work, which I have to go to work every morning between 20 to eight and 8 o'clock.

"Q. When did you first see these three men on Wednesday morning? A. When they started shooting at me.

"Q. Where were they when they started shooting at you? A. I don't know, I can't say.

"Q. Was it inside the building? A. Yes.

"Q. What floor? A. Between 3-A, I was caught between 3-A and 2-A.

"Q. On the stairway, on the landing between the second and third floor? A. The stairs come down like this, right? My house is 3-A, right?

"Q. Right. A. Then you go down, you make a turn, there is a platform.

"Q. That is half way down to the floor below? A. Wait a minute, 3-A, I am the very first apartment, that would be the last apartment moving out, understand what I mean? It is hard for me.

"Q. You mean the one right near the stairs? A. The one right near where Mike Sullivan lives, he is on the first floor, but I live on the next floor. I was coming down, they had that banister, they were shooting like this and you can't get around it, that is the only reason I ain't dead, I guess.

"Q. How close was he to the banister? A. About that far away.

"Mr. Keating: Indicating two feet.

"Q. Who was that, Andy? A. Dunn. Then somebody else popped out this way.

"Q. Where was Andy Sheridan standing when the shots were fired? A. I come down, the glare of the light gets you, you don't see right away. I went down the stairs, they popped out bang, bang. I made a leap at him.

"Q. Who did you make a leap at, the man with the gun? A. Yes. I fell down and he pegged two more shots at me. Somebody jumped over me and went upstairs and the other guy went downstairs and Dunn went upstairs.

"Q. How did Dunn get upstairs? A. He jumped over me.

"Q. When did he fire the second two shots? A. Oh, they were all practically in a couple of seconds.

"Q. But were you standing up or lying down? A. I could not get up no more.

"Q. How many shots were fired at you while you were lying down? A. Four.

"Q. What happened while Dunn was jumping over you? A. I tried to grab him, I pulled one leg down, he got away. I was too weak, he hit my mouth.

"Q. Were there any more shots fired at you while Dunn was jumping over you? A. He pegged about six shots altogether, it was very cold, I will tell you that.

"Q. Who was the fellow who went downstairs? A. Danny Brooks.

"Q. How long have you known Danny Brooks? A. About eight or nine years, 12 years, something like that.

"Q. Who was the fellow who ran upstairs first? A. Sheridan, the guy with the glasses.

"Q. What kind of glasses? A. He had them down over his nose and grayish blueish suit.

"Q. What kind of glasses were they, Andy? A. Thick glasses, very thick.

"Q. Who was the second man to run upstairs after the shots were fired? A. Dunn. The other fellow went out the front way.

"Q. Andy, before these shots were fired did any of these three men say anything to you? A. 'Kill the rat * * *, kill him, and kill the rat * * * brother of his.'

"Q. Who said that, Andy? A. Dunn.

"Q. Did anybody else say anything besides Dunn? A. No.

"Q. Did either Danny Brooks or Andy Sheridan say anything to Dunn? A. No, they did a hell of a lot in a few seconds, I can tell you, a lot.

"Q. Is Brooks Danny's right name? A. No, I don't know what his name is, Danny Brooks, that is all I know.

"Q. He is known in the neighborhood by that name, is that right? A. Yes.

"Q. But that is not his right name, is that right? A. Yes.

"Q. What nationality is he? A. Italian, I think.

"Q. Can you describe him to me, Andy? A. About 5 feet 6, nice-built fellow, curly hair, with glasses.

"Q. Does he wear glasses all the time? A. Mostly all the time.

"Q. Light or black hair? A. Black hair. Let me go, will you, please? I am sick as a dog. Come back later on, please.

"Q. All right, that is all now, Andy. A. Yes, I am sick.

"6 P. M."

Anthony Tischon, a former tier-mate of defendant Dunn in Tombs Prison, testified concerning certain conversations which he had with defendant Dunn (trial 622-3):*

Q. [George P. Monaghan, Assistant District Attorney, New York County] Give us all the conversation. A. [Tischon] After I explained what I was arrested for, I, of course, turned and asked him what he was arrested for.

Q. What did he say? A. He says for the Hintz killing, and I thought he meant the Hines killing, due to the fact that I was acquaintance of Jimmie Hines. I figured it was possible maybe Jimmie Hines was killed, and he said no, the Hintz killing. I asked him who Hintz was, and he says, "Some • • • that I had trouble with." I asked him who was he arrested with. He said, "Andy Sheridan" and some fellow Danny. I can't remember the man's name.

Q. You don't remember the third one he said he was arrested with? A. Danny, that's all I remember. I asked him where they were, and he told me that Andy was in Federal detention and that this fellow Danny was in the Bronx prison.

• • •

(trial 627-628):

Q. Now, will you proceed? A. I told him if, —how he felt about the case and everything, his own particular case, and he says, well, he say[s] he was not worrying about it, that there is very little they could do, that there is no eye-

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* This testimony was admitted only as relevant to the guilt of defendant Dunn (trial 628, 631, 632, 633).

witness or anything to the crime, but it is a very bad inconvenience of laying around the Tombs and things like that. So then we got back to my case again and it was going off and on for a while like that and I told him, I say for him not to let me down, if I was to be used as a witness that he would go through with his bargain and he said I needn't worry about it. And I asked him how he felt about the defendants, were they—and the general trend of the thing in prison, would he stand up, and he said he was not worried about Andy, but that he had a little doubt in his mind about this fellow Danny.

Q. About standing up? A. Yes, sir.

• • •

(trial 630-1):

Q. All right, go ahead now and tell us. A. And I had a few, maybe a half hour or so before going to court and I was in need of a shave, and I spoke to Dunn, he gave me the money for the shave. There was a few fellows up ahead of me so we sat down and waited for the time for me to be called and I started a discussion with him concerning his own case and I told him, I says, I asked him, I says—not the exact words—but I brought out, does it look bad, or anything like that? Well, he says, "I can't, you know —" as he told me the day before, he said, "It is just the inconvenience being in here, that there was no actual eyewitness" and we got led back some way or other, Sheridan's name come into this conversation and I asked him if that was the Sheridan I knew.

• • •

Q. Well, you had a discussion about a Sheridan and after your discussion what did he say? A. After the discussion about Sheridan I spoke to him and I complimented

Sheridan, I says that everybody thought a lot of Sheridan, and this and that, and he—

Q. Well, what did Dunn say? A. He told me, he says, if it was not for that * * *, he says, "I would not be here," and I asked him what he meant by that, did the man inform on him or anything like that? He says, "No, the bum did not go through with his bargain." And I asked him what he meant by that.

* * *

(trial 632-3):

Q. Proceed. A. He said, "If it was not for that—" pardon the expression—If it wasn't for that * * * he would not be here. And I asked him—

* * *

Q. And what did he say? A. Can I go on with the story?

Q. Yes, from where you left off. You need not repeat. A. That he did not do the shooting he was supposed to do, and I asked him, "Why, was the guy yellow, or something like that?" He says, "No, what, are you nutty or something?"

Q. He said, "No, he was not"?

The Court: No, he wasn't what?
Mr. Monaghan: Wasn't yellow.

Q. Then what did you say? A. So I asked him, well, what excuse could he have given? So he told me—

* * *

Q. Yes. A. And then he—so he told me that the pistol did not go off, or something, did not shoot.

* * *

(trial 634):

Q. Then what did he say? A. So I followed him, well, things like that do happen, and he says, The pistols that McGrath gave him were strictly no toys, he would not give nobody no toys.

Hearing

On October 6, 1948, at the hearing held by the trial court, defendant Sheridan testified in support of his co-defendants' motion for a new trial (hearing 49-50):

Q. Now, were you present when Andrew Hintz was shot on January 8, 1947, at 61 Grove Street, in the City of New York, at about twenty minutes to eight? A. No, I was not present.

Q. Did you partake in the actual shooting of Mr. Hintz? A. No, I was not.

Q. Did you plan the shooting and killing of Mr. Hintz? A. That I did.

Q. And who planned it with you? A. Just John Duff and Jeff Le Porte.

Q. And Jeff Le Porte? A. Yes.

Q. Did anybody else plan that murder with you. A. No, sir.

Q. Did the defendant, John Dunn, plan it with you? A. No, sir.

Q. Did the defendant Gentile plan it with you? A. No, sir.

Q. Did you direct the killing of Mr. Hintz? A. That's correct.

Q. Did the defendant Dunn have anything to do with that? A. No, sir.

Law and Cases

In *People* v. *Shilitano* (1916) 218 N. Y. 161, 180-181, 182, 112 N. E. 733, 739-740, a motion for a new trial was held properly denied on the basis of a finding that the new evidence was false.

In *Hicks* v. *State* (1937) 213 Ind. 277, 302-304, 11 N. E. (2d) 171, 182 [*cert. den.* 304 U. S. 564], involving another such motion, the court held that its denial rested within the discretion of the trial court.

In *United States* v. *Johnson,* 327 U. S. 106, 111-113, another such case, the Court held that the denial, supported by evidence, presented no reviewable issue.

Cf. Pinson v. *State* (1946) 210 Ark. 56, 61-62, 194 S. W. (2d) 190, 192-193; *People* v. *Weber* (1906) 149 Cal. 325, 349-350, 86 Pac. 671, 681; *Loughridge* v. *State* (1947) 202 Ga. 129, 130-132, 42 S. E. (2d) 473, 474-475; *State* v. *Lee* (1932) 173 La. 966, 971, 139 So. 302, 303; *Commonwealth* v. *Dascalakis* (1923) 246 Mass. 12, 32-33, 140 N. E. 470, 479; *State* v. *Upson* (1925) 162 Minn. 9, 16, 201 N. W. 913, 915; *Sleator* v. *The King* (Western Australia 1914) 16 W. A. L. R. 113, 117-119. See, also, *Hurtado* v. *California,* 110 U. S. 516, 533-534.